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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

No. 88-

HORACE BUTLER,

Petitioner,

v.

JAMES AIKEN, WARDEN, AND THE ATTORNEY GENERAL OF SOUTH CAROLINA, T. TRAVIS MEDLOCK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOHN H. BLUME
FRANKLIN W. DRAPER
Attorneys at Law

South Carolina Death
Penalty Resource Center
P.O. Box 11311
Columbia, SC 29211
(803) 765-0650

Attorneys for Petitioner

QUESTIONS PRESENTED

I.

Did the Court of Appeals violate the rule announced in Shea v. Louisiana by denying petitioner the benefit of Edwards v. Arizona, despite the fact that petitioner's conviction was not yet final on direct review at the time Edwards was decided?

II.

Did the Court of Appeals majority misread Arizona v. Roberson as creating a "new" rule of constitutional law?

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2. Because petitioner's case was pending on direct appeal at the time that this Court decided Edwards v. Arizona, the Court of Appeals incorrectly determined that the "bright-line" rule established in Edwards did not apply retroactively in this case. 10

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Horace Butler, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

CITATION TO OPINIONS BELOW

The opinion of the United States District Court for the District of South Carolina, Butler v. Aiken, C/A. No. 86-1093-3 (D.S.C. June 9, 1987), denying Butler's petition for a writ of habeas corpus is unreported, and may be found at J.A. 1606. A copy of the District Court's opinion is attached to this petition as Appendix A. The initial panel opinion of the United States Court of Appeals for the Fourth Circuit, affirming the denial of a writ of habeas corpus, is reported as Butler v. Aiken, 846 F.2d 255 (4th Cir. 1988), and is attached to this opinion as Appendix B. The order of the Court of Appeals denying rehearing and rehearing en banc is unreported. Butler v. Aiken, No. 87-4004 (4th Cir. June 15, 1988). The order of the United States Court of Appeals for the Fourth Circuit modifying the panel's decision on reconsideration of the order denying rehearing, and denying rehearing en banc, with five judges dissenting, is reported as Butler v. Aiken, No. 87-4004 (4th Cir. Dec. 12, 1988). A copy of the order modifying the panel opinion and the dissent from the

denial of rehearing is attached to this petition as Appendix C.[1]

JURISDICTION

The order of the United States Court of Appeals for the Fourth Circuit denying the petition for rehearing with suggestion for rehearing en banc was entered December 2, 1988. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted below and asserting herein a deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fifth Amendment to the United States Constitution, which provides in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

Petitioner was convicted and sentenced to death for the murder of Pamela Lane. A key piece of evidence against him was his confession. A panel of the United States Court of Appeals for the Fourth Circuit found that petitioner's confession was obtained in violation of the Fifth Amendment principles of Edwards v. Arizona, 451 U.S. 477 (1981), and Arizona v. Roberson, ___ U.S. ___, 108 S.Ct. 2093 (1988). However, the court denied habeas corpus relief on the sole ground that Roberson should not be applied retroactively to petitioner's conviction, which had become final on direct review after Edwards but before Roberson. The pertinent facts are as follows.

Four Charleston County police officers arrested petitioner on the evening of August 30, 1980, on a charge--later dismissed--unrelated to the murder of Pamela Lane. The officers brought petitioner to the county jail, where he remained until his bond

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[1] The opinion of the South Carolina Supreme Court affirming Petitioner's conviction and sentence of death is reported as State v. Butler, 277 S.C. 452, 290 S.E.2d 1, cert. denied, 459 U.S. 932 (1982). The South Carolina Supreme Court opinion affirming Petitioner's conviction after granting a petition for writ of certiorari requesting review of the denial of petitioner's application for post-conviction relief is reported as Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985), cert. denied, 474 U.S. 1093 (1986).

hearing late the following evening. Prior to the hearing, petitioner invoked his right to counsel by retaining a local attorney, W. McAlister Hill. Hill appeared with petitioner at the bond hearing on August 31. petitioner was unable to post bond and was returned to the Charleston County Jail. Hill later testified that he warned the police against any further questioning of his client, but the officers claimed not to remember any such instruction.

A few hours after the bond hearing, at 12:15 a.m. on September 1, the same four officers who had arrested petitioner on the assault charge brought him to the Charleston County Police Headquarters where they initiated an interrogation concerning the murder of Miss Lane. After informing petitioner that they were charging him with the Lane murder, the police officers questioned him for some five hours, during which time they obtained two separate Miranda waiver forms and two different statements regarding his participation in the crime. Both of these statements were introduced against petitioner at his trial. Petitioner was not returned to the county jail until 10:30 a.m., after he had shown police the scenes where the crime took place.[2]

In January, 1981, a Charleston County jury convicted petitioner of murder and sentenced him to death. While petitioner's case was pending on direct appeal to the South Carolina Supreme Court, this Court announced its decision in Edwards v. Arizona, 451 U.S. 477 (1981). Some nine months after Edwards was decided, on February 22, 1982, the South Carolina Supreme Court affirmed petitioner's conviction and sentence of

[2]The state court record also reveals that petitioner functions on the borderline of the mentally retarded range, with a mental age of between seven and eleven, and an I.Q. between the high sixties and the low seventies. When he completed his education at age sixteen, he had just finished the fourth grade. The record also indicates that petitioner's attorney, Mr. Hill, was not informed that the police planned to interrogate his client after the attorney left the bond hearing and petitioner was returned to the county jail. Nor is there the slightest evidence that Hill consented to any such interrogation. In fact, Hill testified in state collateral proceedings that he specifically instructed the police at the bond hearing not to talk to petitioner at all.

death. State v. Butler, 277 S.C. 452, 290 S.E.2d 1, cert. denied, 459 U.S. 932 (1982).

After exhausting his state collateral remedies, Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985), cert. denied, 474 U.S. 1093 (1986), petitioner filed a petition for habeas corpus in the District Court of South Carolina alleging, inter alia, that his Fifth Amendment rights under Edwards had been violated by the police officers' initiation of questioning about the murder of Pamela Lane after petitioner had invoked his right to counsel just hours before in connection with the assault charge. The District Court, apparently unaware that petitioner's conviction had not yet become final when Edwards was decided, dismissed his Edwards claim on grounds that he was not entitled to retroactive application of the "bright line" test enunciated in Edwards. J.A. 1640. On appeal, a panel of the Fourth Circuit Court of Appeals acknowledged that the district court's nonretroactivity holding was erroneous. The appeals court nevertheless denied relief, holding that Edwards did not bar police initiation of questioning concerning a charge other than the one for which the suspect had invoked his Fifth Amendment right to counsel. Butler v. Aiken, 846 F.2d 255 (4th Cir. 1988).

Just after the Court of Appeals denied petitioner's request for rehearing and suggestion for rehearing en banc, Butler v. Aiken, No. 87-4004 (4th Cir. June 15, 1988), this Court announced its decision in Arizona v. Roberson, ___ U.S. ___, 108 S.Ct. 2093 (1988). On petitioner's motion for reconsideration, the Court of Appeals requested that the parties submit briefs as to the effect of the intervening decision in Roberson, ___ U.S. ___, 108 S.Ct. 2093 (1988). On December 2, 1988, the panel of the Court of Appeals issued a modified opinion acknowledging that the procedures by which petitioner's statements were obtained were invalid under Roberson. However, the panel adhered to its earlier judgment denying relief on the sole ground that Roberson should not be accorded "retroactive" effect. Butler v. Aiken, No. 87-4004 (4th Cir. Dec. 2, 1988). Rehearing en banc was

denied by a vote of six to five. The dissenting judges filed an opinion which pointed out that the Roberson Court had expressly rejected the suggestion that the holding of that case represented any extension of Edwards. For this reason, according to the dissenting judges, Roberson presented no question of retroactivity, and the invalidity of petitioner's conviction under both Roberson and Edwards mandated that he be granted habeas relief.

HOW THE FEDERAL QUESTIONS WERE DECIDED BELOW

After the respondent unconditionally waived the defense of nonexhaustion of state remedies, J.A. 1499-1500, the United States Magistrate to whom the case was initially referred recommended that relief be denied on petitioner's Edwards claim. The magistrate reasoned that under Michigan v. Mosley, 423 U.S. 96 (1975), the police interrogation of petitioner about the murder was permissible because the questioning focused only on a crime different in time, place, and nature from the first crime for which petitioner had already retained counsel. J.A. 1586. The district court adopted the magistrate's reasoning, and rejected petitioner's reliance on United States ex rel. Espinoza v. Fairman, 813 F.2d 117 (7th Cir.) cert. denied, ____ U.S. ____, 107 S.Ct. 3240 (1987), a decision granting habeas corpus relief on facts in all material respects identical to those of petitioner's case. The district court concluded that it

> need not consider the propriety of the principles established in Espinoza inasmuch as the underlying ruling in Edwards v. Arizona may not be applied retroactively. Solem v. Stumes 465 U.S. 638 (1984). Petitioner was convicted January 24, 1981. The sentencing phase of his trial was concluded on January 26, 1981. Edwards was decided May 18, 1981.

J.A. 1640.

The original panel decision of the United States Court of Appeals for the Fourth Circuit found that the district court erred in ruling that the "bright-line" rule established by this Court in Edwards v. Arizona did not apply to petitioner's case. The panel concluded that because petitioner's appeal was pending when Edwards was decided, Shea v. Louisiana, 470 U.S. 51 (1985),

mandated that the Edwards rule be applied to petitioner's case. Butler v. Aiken, 846 F.2d 255, 257 (4th Cir. 1988). The panel opinion corrected the district court by stating that although Edwards did not have retroactive effect, it did apply to cases pending on direct appeal at the time Edwards was announced. However, the panel did not believe the "bright-line" rule of Edwards extended to the facts of petitioner's case.

> We fail to see how the actions of the Charleston police could fall within the intent of the Court in Edwards. . . . We see no reason for a different result simply because the custody was continuous.
>
> Properly initiated interrogation on entirely new charges does not intrude into an accused's previously invoked rights but rather offers that accused an opportunity to weigh his rights intelligently in light of changed circumstances. When, as occurred in this case, the accused then freely waives any constitutional right to counsel and provides voluntary statements of an incriminating nature, there is no justification for undermining the search for truth by suppressing those statements.

Id. at 258-59. Therefore, the panel concluded, petitioner's confessions were not obtained in violation of the Fifth Amendment. Id.

The panel subsequently modified its opinion in light of Arizona v. Roberson, supra, which held that the "bright-line" rule of Edwards bars police initiated interrogation following a suspect's request for counsel in the context of a separate investigation. The panel found that:

> the appearance of counsel with Butler at a bond hearing on the assault charge for which he was first arrested conclusively demonstrated invocation of Butler's fifth amendment rights. The subsequent interrogation concerning the Lane murder, occurring during continuous custody, was contrary to the Edwards rule as modified in Roberson.

Order at 2-3. The panel further conceded that if petitioner's case was before the court on direct appeal it would in all likelihood reverse the conviction and remand the case for a new trial. Order at 3. The panel then examined the retroactive effect of Roberson in collateral proceedings in accordance with the three factors established by this Court in Stovall v. Denno, 388 U.S. 293 (1967):

> (1) the purpose of the new rule of law; (2) the extent of reliance by law enforcement authorities on the old

> standard; and (3) the effect of retroactive application upon the administration of justice. Allen v. Hardy, __ U.S. __, 106 S.Ct. 2878, 2880 (1986).

Id. Applying this test, the panel decided that petitioner could not claim any retroactive benefit from Roberson.

> The Edwards-Roberson limitations on police interrogation have only the most tangential relationship to truth finding. They are, rather, a part of the prophylactic protection accorded the fifth amendment right to counsel as a means of establishing "guidelines to the law enforcement profession." Roberson, 56 U.S.L.W. at 4592. The interrogation of appellant, while unquestionably contrary to the present "guidelines," was conducted in strict accordance with established law in 1980 [the date of petitioner's arrest]. We, therefore, conclude that Butler may challenge his presumptively valid conviction only by demonstrating that there was an actual violation of his constitutional rights in 1980. On that dispositive issue, the record discloses no support for Butler's claim for habeas relief.

Slip opinion at 3-4. In its retroactivity discussion, the modified panel opinion failed to cite or refer to this Court's decision in Shea v. Louisiana, supra, which held that Edwards was applicable to all cases not yet final on direct review at the time Edwards was decided.

Dissenting from the denial of rehearing en banc, Chief Judge Winter, joined by four other judges, asserted that petitioner's conviction was obtained in violated of the Fifth Amendment. Order at 6. First, the dissent stated that petitioner's confession was constitutionally inadmissible under Edwards standing alone. Id. at 7. Chief Judge Winter then stated that Roberson did not alter the rules of law set forth in Edwards.

> In sum, Roberson says that the law is and has been, since Miranda, that a suspect who has expressed his desire to deal with the police only through counsel is not subject to further interrogation about either the crime he is suspected of having committed or any other crime until counsel has been made available, unless the suspect initiates further communication with the police. There is thus no retroactivity issue presented in the instant case.

Id. at 9 (emphasis in original) (footnote omitted).

REASONS THE WRIT SHOULD BE GRANTED

The decision of the Court of Appeals denying retroactive effect to the rule of Edwards/Roberson is in direct conflict with this Court's decision in Shea v. Louisiana and the decisions of other federal courts of appeal, which hold that Edwards applies to all cases pending on direct appeal at the time that Edwards was decided.

1. This Court's decision in Arizona v. Roberson did not create a new rule of law, but merely applied the "bright-line" rule established in Edwards to a different factual setting.

In Edwards v. Arizona, 451 U.S. 477 (1981), this Court held that "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing that he responded to further police-initiated interrogation even if he has been advised of his rights." 451 U.S. at 484 (footnote omitted). Rather once an individual invokes his Fifth Amendment right to counsel, he is not subject to further interrogation by the authorities unless "the accused himself initiates further communication, exchanges, or conversations with the police." Id. at 484-85. The Court realized that it would be "inconsistent with Miranda [v. Arizona, 384 U.S. 436 (1966)] and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." Id. at 485. This "bright line" rule of Edwards has been consistently reaffirmed by this Court. See e.g., Smith v. Illinois, 469 U.S. 91, 98 (1984); Michigan v. Jackson, 475 U.S. 625 (1986) (applying Edwards rule to invocation of Sixth Amendment right to counsel).

Last term in Arizona v. Roberson, this Court applied the Edwards rule to a slightly different factual setting. In Roberson, the accused was arrested and advised of his Miranda rights. He indicated that he wanted to speak with an attorney before answering any questions. While in custody, a different officer questioned him about a different offense. After again

being advised of his rights pursuant to Miranda--and waiving those rights--Roberson gave an incriminating statement to the police as to the second offense. The statement was suppressed by the trial court, and the suppression order was affirmed on appeal. Certiorari was granted and this Court affirmed the decision of the Arizona Court of Appeals. The Court held that Roberson's case was directly controlled by Edwards v. Arizona, and, therefore, the fact that the request for counsel occurred in the context of a separate investigation was without legal significance. 108 S.Ct. at 2098.[3]

On at least two points, the judges in the majority and the five judges dissenting from the denial of rehearing en banc in petitioner's case were in agreement. First, both the majority and the dissent acknowledged that under this Court's analysis in Arizona v. Roberson, petitioner's conviction was constitutionally infirm. Secondly, both sides appeared to acknowledge that Arizona v. Roberson was not new law but rather was merely an application of the "bright-line" rule created in Edwards to slightly different facts. See Order at 2-3 ("[t]he subsequent interrogation concerning the Lane murder, occurring during continuous custody, was contrary to the Edwards rule as modified in Roberson," and discussing the "Edwards-Roberson limitations on police interrogation"); Order at 8 ("Roberson did not alter these [Edwards] rules of law") (Winter J., dissenting from the denial of rehearing en banc).

These points of agreement were compelled by this Court's decision in Roberson. There, the Court framed the question as whether to "craft an exception to [the rule of Edwards v. Arizona] for cases in which the police want to interrogate a suspect about an offense that is unrelated to the subject of their initial interrogation." 108 S.Ct. at 2096. The majority ultimately concluded that "[p]etitioner's attempts at

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[3]"That a suspect's request for counsel should apply to any questions the police wish to pose follows, we think, not only from Edwards and Miranda, but also from . . . [Colorado v. Spring, 479 U.S. 564 (1987)]." 108 S.Ct. at 2099.

distinguishing the factual setting here from that in Edwards are . . . unavailing," and affirmed the judgment of the Arizona Court of Appeals. 108 S.Ct. at 2100-01. Thus Roberson involved nothing more than a straightforward application of the Edwards rule to slightly different facts. Under these circumstances, the question before this Court is whether the bright-line rule of Edwards v. Arizona applies retroactively to petitioner's case.[4] Because this Court has already answered this question in the affirmative in Shea v. Louisiana, supra, the Court of Appeals' ruling to the contrary should be reversed.

2. Because petitioner's case was pending on direct appeal at the time that this Court decided Edwards v. Arizona, the Court Appeals incorrectly determined that the "bright-line" rule established in Edwards did not apply retroactively in this case.

The Court of Appeals determined that the "bright-line" rule established in Edwards v. Arizona, supra, and reaffirmed last Term in Arizona v. Roberson, did not apply in petitioner's case because the Edwards rule was not in effect at the time of his arrest in 1980. The panel stated:

> We, therefore, conclude that Butler may challenge his presumptively valid conviction only by demonstrating

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[4]See United States v. Johnson, 457 U.S. 537, 548 (1982). In Johnson, this Court recognized:

> [W]hen a decision of this Court merely has applied settled precedents to new and different fact situations, no real question has arisen as to whether the new decision should apply retrospectively. In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that decision in any material way.

Id. at 549 (citations omitted). The need for this "threshold test" is self-evident. If every constitutional decision applying settled legal precedents to new facts were deemed to give rise to a "retroactivity" question, no decision would ever have any precedential effect, since each decision would establish on the date of its announcement a new starting date for the constitutional right involved. For this reason, the Court has invariably insisted upon "automatic" retroactive application of any decision which "did nothing more than apply settled precedent to different factual situations." Griffith v. Kentucky, 479 U.S. 314, 324 (1987); see also Yates v. Aiken, 108 S.Ct. 534, 538 (1988) (because Francis v. Franklin, 471 U.S. 307 (1985) was "merely an application of the principle that governed our decision in Sandstrom v. Montana, [442 U.S. 510 (1979)]" it applied to petitioner's 1981 murder trial); Truesdale v. Aiken, 480 U.S. 527 (1987) (per curiam); Lee v. Missouri, 439 U.S. 461 (1979) (per curiam).

> that there was an actual violation of his constitutional rights in 1980. On that dispositive issue, the record discloses no support for Butler's claim for habeas relief.

Order at 4. The modified order of the panel totally ignores one basic fact which is dispositive of petitioner's claim: Edwards v. Arizona was decided while petitioner's case was pending on direct appeal to the South Carolina Supreme Court. Thus this Court has already resolved the retroactivity question presented in this case. In Shea v. Louisiana, 470 U.S. 51 (1985), this Court specifically held that Edwards applied to cases pending on direct review at the time it was decided. 470 U.S. at 59. See also Griffith v. Kentucky, 479 U.S. at 328 ("We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases sate or federal, pending on direct review or not yet final");[5] Yates v. Aiken, ___U.S.___, 108 S.Ct. 534, 537 (1988) (acknowledging that new rules apply retroactively to cases pending on direct review at time rule was established). Thus, as Edwards was decided on May 18, 1981, and the South Carolina Supreme Court did not issue its opinion in petitioner's case until February 22, 1982, Shea permits no other conclusion except that the "bright-line" rule of Edwards was applicable in this case. The Court of Appeals was incorrect in ruling otherwise.[6] See Shea, supra; see also Lamp v. Farrier, 763 F.2d 994, 997 n. 5 (8th Cir. 1985) (Edwards applied to case tried before Edwards but pending on direct appeal at time Edwards was handed down); accord, Flournev v. Marshall, 842 F.2d 875, 878 (6th Cir. 1988); United States ex rel. Adkins v. Greer, 791 F.2d 590, 595 n. 3 (7th Cir. 1986); Greenwalt v. Ricketts, 784 F.2d

[5]In Griffith this Court explicitly reaffirmed its decision in Shea. 479 U.S. at 325-26.

[6]The order of the Court of Appeals denying rehearing relied exclusively on Allen v. Hardy, 478 U.S. 255 (1986) (holding that Batson v. Kentucky, 476 U.S. 79 (1986) did not apply retroactively to cases already final on direct review at the time Batson was decided), and Solem v. Stumes, 465 U.S. 638 (1984) (holding that Edwards did not apply retroactively to cases already final on direct review at the time Edwards was decided). In its December 2 order, the Court of Appeals never discussed the applicability of--or even cited--this Court's retroactivity rulings in Shea v. Louisiana and Griffith v. Kentucky.

1453, 1457 (9th Cir. 1986); Cervi v. Kemp, 855 F.2d 703, 705 n. 9 (11th Cir. 1988).

What makes the retroactivity decision reached by the panel in its modified order all the more mystifying is that the panel had previously held that Edwards did apply retroactively to petitioner's case. In its previous decision, the panel noted that the district court had erroneously concluded that Edwards was not applicable because it had not been decided at the time of petitioner's trial. Butler v. Aiken, 846 F.2d at 257.

> Unfortunately, the district court's failure to address this claim on the merits must be regarded as error. Although Edwards does not have retroactive effect, it does apply to cases pending on direct appeal at the time it was decided. Shea v. Louisiana, 470 U.S. 51, 105 S.Ct. 1065, 84 L.Ed.2d 38 (1985). Butler's appeal was in fact pending at that time. We must, therefore, consider whether Butler's interrogation did produce incriminating statements in violation of his right to counsel.

Id.[7] Thus in its order modifying its previous opinion, the panel apparently reversed itself on this issue.

The panel apparently concluded at this stage of the proceedings that because petitioner's case was before it in a federal habeas corpus proceeding, the proper inquiry was whether Edwards was in effect at the time of petitioner's arrest and trial. Order at 3.[8] However, as this Court's retroactivity

[7]The panel ultimately concluded that there was not constitutional violation because the interrogation took place in conjunction with a separate investigation. 846 F.2d at 257-58. This, of course, is the reasoning rejected last term in Roberson.

[8]The panel stated:

> As an initial matter, we reject respondent's efforts to distinguish Roberson factually. We assume for the purposes of decision that the appearance of counsel with Butler at a bond hearing on the assault charge for which he was first arrested conclusively demonstrated invocation of Butler's Fifth Amendment rights. The subsequent interrogation concerning the Lane murder, occurring during continuous custody, was contrary to the Edwards rule as modified in Roberson. If this case were before us on direct appeal, we would in all likelihood be compelled to reverse the conviction and remand for a new trial. It does not follow, however, that Butler is entitled to habeas relief based upon a rule of law that was not in effect at the time of his arrest and trial.

Id.

decisions reveal, the court in which the case is pending cannot determine whether the applicability of a decision of this Court. Rather, the decision properly turns on whether the legal rule in question was in effect at the time the case became final on direct review. See Griffith v. Kentucky, 479 U.S. at 328 ("a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final. . . ."); see also Yates v. Aiken, supra; Shea v. Louisiana, supra. If the rule was in effect, or became effective, at any time prior to the case becoming final on direct review, then a habeas corpus petitioner is entitled to the benefit of that rule in his case.[9] The decision of the Court of Appeals' decision ignores this well settled rule, and cannot stand.

[9]At the risk of belaboring the obvious, petitioner would note that any other conclusion would lead to anomalous results. If retroactivity of a constitutional rule turned solely on the stage of the proceedings in which the retroactivity question arose, without regard to when the rule was established, a state court could effectively eliminate federal habeas corpus review by the simple expedient of refusing to give effect on direct appeal to new constitutional decisions of this Court. This would essentially give the state courts the power to nullify the decisions and constitutional principles established by this Court, without protecting any legitimate state interest. In short, the rule apparently adopted by the Court of Appeals would effectively turn the Supremacy Clause on its head.

CONCLUSION

Because the decision of the Court of Appeals is in direct conflict with the applicable decisions of this Court governing the retroactivity of constitutional decisions, the judgment below should be summarily reversed, and petitioner's case should be remanded with instructions to grant the writ of habeas corpus. Truesdale v. Aiken, 480 U.S. 527 (1980). Alternatively, the petition for writ of certiorari should be granted.

Respectfully submitted,

JOHN H. BLUME
FRANKLIN W. DRAPER
Attorneys at Law

South Carolina Death
Penalty Resource Center
P.O. Box 11311
Columbia, SC 29211

BY: John H. Blume
ATTORNEYS FOR PETITIONER

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APPENDIX A

Supreme Court, U.S.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Horace Butler,

Petitioner,

vs.

James Aiken, Warden, Central Correctional Institution, and Travis Medlock, Attorney General, State of South Carolina,

Respondents.

ORDER

C/A No. 86-1093-3

This matter is before the Court for review of the Magistrate's Report made in accordance with 28 U.S.C. § 636(b)(1)(B) and the Order of the District Court filed May 9, 1987.

The Magistrate makes only a recommendation to this Court. The recommendation has no presumptive weight, and the responsibility to make a final determination remains with the Court. Mathews v. Weber, 423 U.S. 261 (1976). The Court is charged with making a de novo determination of those portions of the Report and Recommendation to which specific objection is made, and the Court may accept, reject or modify, in whole or in part, the recommendation of the Magistrate, or recommit the matter to him with instructions. 28 U.S.C. § 636(b)(1).

BACKGROUND

Petitioner is incarcerated by the South Carolina Department of Corrections at the Central Correctional Institute, awaiting

execution for the crime of murder. He was indicted in October 1980 in Charleston County. After timely notice that the circuit solicitor intended to seek the death penalty, the petitioner was tried on January 19, 1981 before The Honorable C. Anthony Harris. A verdict of guilty was returned on January 24, 1981. On January 26, 1981 the jury further recommended imposition of the death penalty after finding the murder was committed while in commission of the crime of rape.

Petitioner filed an appeal of his conviction and sentence, but these were affirmed by the South Carolina Supreme Court on February 22, 1982. State v. Butler, 277 S.C. 452, 290 S.E.2d 1 (1982). Petitioner then filed a petition for writ of certiorari to the United States Supreme Court, which was denied on October 12, 1982. Butler v. South Carolina, 459 U.S. 932 (1982).

Petitioner next filed an application for post-conviction relief. A hearing was held April 1, 1983 before The Honorable Richard E. Fields. On January 28, 1984 the petition was denied. An appeal of this denial was filed with the South Carolina Supreme Court, but the appeal was denied August 27, 1985. Petitioner then filed another petition for certiorari before the United States Supreme Court, which was denied. Butler v. South Carolina, No. 85-5926, filed January 26, 1986.

Petitioner filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 on May 2, 1986 alleging numerous violations of his constitutional rights. He is currently represented by Dale Cobb, Esquire, of Charleston. Respondents filed a motion for summary judgment on June 13, 1986. The Magistrate's Report and

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Recommendation was filed March 9, 1987. In his Report, the Magistrate recommended that respondents' motion for summary judgment be granted. Petitioner filed Objections to this Report April 10, 1987.

Respondents submit that petitioner has apparently exhausted all state remedies available and respondents unconditionally waive the defense of exhaustion as to all issues presented in the petition.

FACTS

The victim was Pamela Lane, an eighteen year old white female. At the time of her death, Lane was working as a clerk at Dodge's, a small convenience store on Highway 17, south of Charleston. On July 17, 1980 Lane worked the afternoon and evening shift. During her shift, her sister and brother-in-law delivered a new Moped to the store for Lane to ride home on. At 10:00 p.m. Lane and another employee closed the store and prepared to leave. Lane had some difficulty starting the Moped and called her sister several times. After the last telephone call at about 10:30 p.m., she successfully started the Moped and left the store. The other employee told Lane's sister that Lane was "on her way." Lane was last seen alive heading south on Highway 17 on her new Moped.

Early the next morning Lane's sister reported her disappearance. A few hours later several people fishing from a bridge discovered a body and reported it to the police, who determined it was the body of Pamela Lane. She had been shot once in the chest by a small caliber gun. The following day the

minister of a local church discovered a Moped partially submerged in the pond behind his church. After seeing news reports on the death of Pamela Lane, he contacted authorities. The Moped was identified as the one Pamela Lane was riding when last seen.

Six weeks later, on August 30, 1980, Horace Butler was arrested on an unrelated charge and placed in the Charleston County Jail. He retained a local attorney, W. McAlister Hill, who appeared with him at a bond hearing late Sunday evening, August 31, that same day, but was unable to make bond and remained in jail. In the early morning of September 1, 1980 at 12:50 a.m., Butler was removed from his cell and transported to the Charleston County Police Department. From that time until approximately 5:45 a.m., he was interrogated about the murder of Pamela Lane. During this period Butler made two confessions and signed two "waiver of rights" forms.[1] He apparently did not request his attorney's presence at any time.

In his first confession Butler claimed a friend, named Larry White, had killed Lane and then sought Butler's help in disposing of the Moped. After reciting this version, one of the police officers present told Butler he did not believe the story because there were too many inconsistencies and because Larry White had already talked to them. Butler then signed the second waiver form and confessed to the murder of Pamela Lane. According to the second confession, Butler saw Lane on her Moped and followed her. When he blinked his lights at her she pulled off the road,

[1] A form waiving the rights guaranteed an accused under Miranda v. Arizona, 384 U.S. 436 (1966).

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hid the Moped in some bushes and got in his car. After driving to a wooded area, he claims she suggested sex and began removing her clothes. After the alleged consensual sex, as she was redressing, he claims she said she was going to be late getting home and would cry rape. Butler stated that he panicked and shot her, then dumped her body off the bridge where it was found. He claims he then found Larry White who helped him dispose of the Moped.

After making the second confession, petitioner took police to the area where these events occurred and identified the actual scenes where he met the victim, had sexual relations with her and killed her.

ISSUES

The issues presented in petitioner's Objections are:

1. Ineffective assistance of counsel.

2. Denial of petitioner's Sixth and Fourteenth Amendment rights to a jury selected from a representative cross section of the community.

3. Denial of petitioner's Sixth, Eighth and Fourteenth Amendment rights to a fair and impartial jury by qualifying a juror who could not vote for a life sentence.

4. Denial of petitioner's Fifth and Fourteenth Amendment rights to due process by allowing evidence of unrelated prior crimes.

5. Denial of petitioner's Fifth, Sixth and Fourteenth Amendment rights by permitting statements to be introduced in

violation of South Carolina's copy rule (S. C. Code §§ 8-15-50, 19-1-80 and 19-1-90).

6. Denial of petitioner's Fifth and Fourteenth Amendment rights to due process by failing to instruct the jury that voluntary manslaughter was a possible verdict.

7. Denial of petitioner's Fifth, Sixth and Fourteenth Amendment rights to be informed of the charges against him because the state never indicted him for rape.

8. Denial of petitioner's Fourteenth Amendment rights not to be convicted except upon evidence sufficient to convince a rational trier of fact of his guilt beyond a reasonable doubt.

9. Denial of petitioner's Fifth, Sixth and Fourteenth Amendment rights by use of an impermissible definition for the term reasonable doubt.

10. Denial of petitioner's Fifth, Sixth and Fourteenth Amendment rights by the trial judge's failure to instruct the jury about the consequences of a non-unanimous recommendation of sentence.

11. Denial of petitioner's Eighth Amendment right to an appropriate review of his death sentence.

12. Denial of petitioner's Fifth, Sixth and Fourteenth Amendment rights by the impermissible jury instruction presuming malice from the use of a deadly weapon.

13. Denial of petitioner's Fifth, Sixth and Fourteenth Amendment rights by virtue of the trial judge's charging the definition of rape in lieu of the definition of criminal sexual conduct during the sentencing phase of petitioner's trial.

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14. Denial of petitioner's Fifth, Sixth and Fourteenth Amendment rights by the trial judge refusing to charge circumstantial evidence.

15. Denial of petitioner's Fifth, Sixth and Fourteenth Amendment rights by failure of the trial judge to rule on the petitioner's claims that the statement(s) taken from him were not the product of a free and voluntary waiver.

DISCUSSION

1. INEFFECTIVE ASSISTANCE OF COUNSEL.

Horace Butler was represented by William McAlister Hill. Mr. Hill testified that he had been practicing law in South Carolina since 1974 and that prior to that time he was a state magistrate for four and a half years.

Mr. Hill testified that he was initially retained to represent Butler on an unrelated charge on August 31, 1980. He had previously represented Butler in a workman's compensation case and he had known Butler's father and family for a number of years.

Petitioner contends that he was denied the effective assistance of counsel both at the guilt phase of his trial and at the sentencing phase. Specifically in his Objections, petitioner has listed seven different areas in which he contends his trial counsel was ineffective.

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court gave specific guidance for evaluation of ineffective assistance of counsel claims:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that tenders the result unreliable.

466 U.S. at 687.

The two components of a claim for ineffective assistance of counsel are commonly called error and prejudice. To demonstrate error, the "defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 689. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Turner v. Bass, 753 F.2d 352 (4th Cir. 1985). Furthermore, prejudice to the defense must be present for reversal. Strickland requires that

> [t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland v. Washington, 466 U.S. at 694; Briley v. Bass, 750 F.2d 1238 at 1247 (4th Cir. 1984).

Strickland noted other areas for courts to be sensitive to in its review of these claims. The Court emphasized that "judicial scrutiny of counsel's performance must be highly deferential" and that "a court must indulge a strong presumption

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that counsel's conduct falls within the wide range of reasonable professional assistance," viewing the case as of the time of counsel's conduct rather than in hindsight, and recognizing counsel's discretion in the shaping of trial strategy. 466 U.S. at 689-690.

A. Counsel failed to object to highly prejudicial testimony regarding the petitioner's propensity "to carry a pistol."

At trial the prosecution posed the following question to Larry White:

Q: Was he [petitioner] known to carry a pistol? The witness responded affirmatively.

Petitioner contends that failure to object to this question constitutes ineffective assistance of counsel. The South Carolina Supreme Court considered this issue on direct appeal. That court concluded that there was "no error" in the admission of the testimony since it was merely cumulative. Therefore, the admission of this testimony fails to meet the prejudice prong of the Strickland test.

B. Failing to display even the rudimentary knowledge of how to proceed with a Jackson v. Denno hearing.

The main contention petitioner advances in this argument is Mr. Hill's alleged unfamiliarity with the proper procedure in the suppression hearing. The record reveals that Mr. Hill was prepared to proceed initially at the hearing rather than waiting for the state to proceed, as is customary in such hearings.

In its consideration of this issue the South Carolina Supreme Court concluded that Mr. Hill desired to proceed first as a matter of trial tactics based upon an informed opinion and his understanding of the totality of the circumstances surrounding the confession. The Strickland test mandates that this Court recognize counsel's discretion in the shaping of trial strategy. Nevertheless, inasmuch as the state proceeded first in presenting its case in the hearing, there could be no prejudice arising from Mr. Hill's intended strategy.

C. Failure of counsel to recuse himself and testify at the Jackson v. Denno hearing.

Petitioner contends that only Mr. Hill knew that he had warned the police not to talk to the Petitioner. At trial the police officers specifically denied that counsel told them not to talk to the petitioner. (See Tr. pp. 88, 96, 113).

Nevertheless, the objection is without merit. Any instruction to the police not to talk to the petitioner could not have related to the murder charge. At the time of the alleged instruction none of the individuals knew that the petitioner was a suspect in the murder investigation.

Petitioner's Sixth Amendment right to counsel had not yet attached as to the murder charge. Maine v. Moulton, ___ U.S. ___, 106 S.Ct. 477 (1985). Furthermore, Miranda is designed to protect the suspect's Fifth Amendment rights. It will not be extended to attorney's communications to the police concerning his client. Moran v. Burbine, ___ U.S. ___, 106 S.Ct. 1135 (1986).

Therefore, the failure of counsel to recuse himself and testify about the warnings did not deprive the petitioner of any constitutional protections. Nor is any prejudice to his case apparent from this omission.

D. Failure to investigate, prepare and present alibi witnesses.

Petitioner claims that trial counsel failed to make a sufficient preliminary investigation into the possibility of presenting an alibi defense. Mr. Hill testified that he made a full investigation as to all possible alibi witnesses for the petitioner. (App. at 287, et seq.). Therefore, this ground for relief is patently meritless under Strickland.

E. Failure to specifically interview Margo Brown.

The error complained of in this assertion is that counsel failed to interview Ms. Brown, a potential State's witness. Mr. Hill testified that he had extensive knowledge of the relationship between Ms. Brown and the petitioner. He had in fact defended the petitioner in an action brought by Ms. Brown arising from his allegedly "threatening to throw her baby in the fire." (App. at 291). Mr. Hill was acutely aware of her "deep hatred for Horace."

In light of counsel's familiarity with Ms. Brown and her failure to testify, this Court cannot discern any prejudice to petitioner's case resulting from failure to

interview Ms. Brown; nor has petitioner demonstrated any such prejudice.

F. Counsel failed to prepare or present mitigating testimony despite his avowed knowledge that it was available.

Although Mr. Hill did not present any mitigation testimony, the record is replete with testimony regarding his consideration of mitigation witnesses, his discussions with the petitioner regarding these witnesses and his reasons for not calling each of the witnesses considered. (See App. pp. 66-74, 161-172, 192-199, 289-290, 314-315, 350-358, 423). Mr. Hill adequately explained his decision not to use these witnesses from a strategical point of view. Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977). Petitioner has failed to prove that his tactics were unreasonable under prevailing professional standards or that the presentation of such evidence would have rendered a more favorable sentence.

G. Failure to have petitioner psychiatrically evaluated for the sentencing phase of the trial.

At the trial Mr. Hill presented the testimony of the petitioner's elementary school principal, Mr. Isiah Frazier. Mr. Frazier testified as to the petitioner's poor academic record and that he left school at age sixteen while he was in the fourth grade. (Tr. pp. 1004-1008).

During the post-conviction hearing petitioner presented the testimony of Dr. John Roitzsh, a clinical psychologist.

This testimony indicated that petitioner tested as a borderline mental retardate. (App. pp. 152, 156).

Like the state court, this Court finds that the failure to present psychological evaluations does not rise to the level of ineffective assistance of counsel. Although such evidence may have been beneficial, it would not have revealed any additional mitigating evidence. The testimony of Mr. Frazier, if believed, was sufficient to reveal the message contained in the psychiatric evaluation, i.e., that petitioner was impaired by a lack of education and low intelligence level. The absence of the psychiatric evaluation did not prejudice petitioner's defense.

2. DENIAL OF PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A JURY SELECTED FROM A REPRESENTATIVE CROSS SECTION OF THE COMMUNITY.

Petitioner asserts that the jury for his trial was improperly selected, in that eight potential jurors were excluded because they opposed the death penalty, thus denying petitioner a jury which fairly represented a cross section of the community. The jury as it was eventually empanelled contained nine whites and three blacks; and there were two alternates (one white, one black). Petitioner has argued that these jurors were not a representative cross section of the community because no person unalterably opposed to the death penalty served on the jury.

In the recent case of Lockhart v. McCree, 476 U.S. ___, 90 L.Ed.2d 137 (1986), the Court concluded that jurors who are unalterably opposed to the death penalty may be excluded from serving during the penalty phase. Furthermore, their exclusion

from the guilt phase does not infringe on a defendant's right to an impartial jury. The Court reiterated in Lockhart that a defendant is not entitled to a jury which statistically mirrors the make-up of a community, but only to a jury from which members of a "distinctive group" have not been systematically excluded. See also Batson v. Kentucky, 476 U.S. ___, 90 L.E.2d 69 (1986). Although the Lockhart majority stopped short of defining "distinctive group," the opinion does indicate that individuals who could not under any circumstances render a capital sentence (a.k.a. "Witherspoon excludables") do not constitute such a "distinctive group" for cross section purposes. 106 S. Ct. at 1765.

Therefore, petitioner's Sixth and Fourteenth Amendment rights to a jury selected from a representative cross section of the community have not been violated by the exclusion of jurors who could not recommend a capital sentence.

3. DENIAL OF PETITIONER'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR AND IMPARTIAL JURY, BY QUALIFYING A JUROR WHO COULD NOT VOTE FOR A LIFE SENTENCE.

Petitioner next alleges that one juror, Jennings B. Knight, should have been excluded for cause based on his belief that the death penalty is warranted in all cases of murder. The trial judge questioned Mr. Knight about his ability to apply the law as it was charged. After considering the responses to these questions the trial judge was satisfied that Mr. Knight was properly qualified to sit as a juror.

In Wainwright v. Witt, 469 U.S. 412 (1985), the Court indicated that a juror may not be excluded for cause unless his

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views on capital punishment would prevent him from performing his duties as a juror in accordance with his instructions and his oath. In reviewing the qualification of a juror the trial judge's factual finding of the juror's capacity is the determinative inquiry.

Under 28 U.S.C. § 2254(d) federal courts must accord a presumption of correctness to state court findings of fact. The statute provides that "a determination after a hearing on the merits of a factual issue, made by a state court of competent jurisdiction ... shall be presumed to be correct."

Petitioner has failed to offer any evidence which undermines the § 2254(d) presumption on this issue. Based on the record and the trial judge's satisfaction with Mr. Knight's responses, this Court concludes that he was properly qualified as a juror.

4. DENIAL OF PETITIONER'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS BY ALLOWING EVIDENCE OF UNRELATED PRIOR CRIMES.

Petitioner next asserts that the trial judge allowed a prosecution witness, Larry White, to testify about matters which improperly attacked petitioner's character and connected petitioner to prior crimes. The testimony giving rise to this objection was elicited by the prosecutor when he asked whether the petitioner "was known to carry a pistol?" There was no objection to the question or the witness' affirmative response.

The South Carolina Supreme Court addressed this issue and concluded that admission of the testimony constituted no error as a matter of state law.

Absent "circumstances impugning fundamental fairness or infringing specific constitutional protections," admissibility of evidence does not present a federal question. Grundler v. North Carolina, 283 F.2d 798, 802 (4th Cir. 1960). This Court discerns no such unfairness or constitutional infringement in the admission of this evidence.

5. DENIAL OF PETITIONER'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS BY PERMITTING STATEMENTS TO BE INTRODUCED IN VIOLATION OF SOUTH CAROLINA'S COPY RULE (S. C. CODE §§ 8-15-50, 19-1-80 AND 19-1-90).

Under South Carolina law, a person who makes a "statement," particularly a witness in a criminal proceeding, must be given a copy of the statement at the time it is made. S. C. Code §§ 8-15-50 and 19-1-80, 90 (1976). Petitioner signed a confession on September 1, 1980 but was not given a copy until September 22, 1980. The trial judge nonetheless allowed the confession to be admitted at trial over objection of counsel. The South Carolina Supreme Court agreed and construed the statutes to mean that the witness (or here, the petitioner) must be allowed ample opportunity to review the statement and, if desired, to refute the statement. They found that the purpose of the rule had been fulfilled since petitioner had nearly four months to review the statement before his trial.

A decision on state law by a state court is entitled to be given great weight and where they do not infringe on specific constitutional protections, violations of state law are not cognizable under 28 U.S.C. § 2254. Chance v. Garrison, 537 F.2d 1212 (4th Cir. 1976) (citing Grundler, supra).

6. DENIAL OF PETITIONER'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS BY FAILING TO INSTRUCT THE JURY THAT VOLUNTARY MANSLAUGHTER WAS A POSSIBLE VERDICT.

Despite requests from the petitioner the trial judge refused to charge manslaughter as a possible verdict. At trial counsel argued that the victim's alleged threat to accuse the petitioner of rape was sufficient provocation to justify instruction on the lesser offense. The South Carolina Supreme Court, like the trial judge, disagreed, specifically finding no "legal provocation" in these circumstances which would warrant an instruction as to manslaughter.

The elements of a crime are defined by state law. Specifically, S.C. Code Ann. § 16-3-10 (1976), defines the crime of murder. The elements of manslaughter are defined at S. C. Code Ann. § 16-3-50 (1976). This issue raises a question of proper jury instructions as a matter of state law. The case of Grundler v. North Carolina, supra, specifically addresses federal review of jury instructions. Even if this Court disagreed with the trial judge's ruling or the state court's interpretation of the law, the issue is immune from federal scrutiny absent limited circumstances not present herein.

Petitioner's attempt to transform this state law issue into a due process violation is unpersuasive. Refusal to charge manslaughter resulted in no fundamental unfairness nor in any abrogation of a constitutional protection.

7. DENIAL OF PETITIONER'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO BE INFORMED OF THE CHARGES AGAINST HIM.

Petitioner argues that he was "held to answer" for the crime of rape without first being indicted, in violation of Article I,

Section 11 of the South Carolina Constitution. The question presented here is whether a person properly charged with capital murder must be indicted for the aggravating circumstances brought out during the trial.

The South Carolina Supreme Court is responsible for interpretations of state law, unless and until those laws infringe on constitutionally protected rights of the individual. Grundler v. North Carolina, supra. The petitioner was not "held to answer" for the separate crime of rape, even though the evidence of rape affected the severity of his punishment. The circumstances which increased the severity of his punishment had to be proven beyond a reasonable doubt. The state met the constitutionally dictated burden of proof on every element of the murder charge and the aggravating circumstances.

8. DENIAL OF PETITIONER'S FOURTEENTH AMENDMENT RIGHTS NOT TO BE CONVICTED EXCEPT UPON EVIDENCE SUFFICIENT TO CONVINCE A RATIONAL TRIER OF FACT OF HIS GUILT BEYOND A REASONABLE DOUBT.

Petitioner alleges that his sentence should be reversed because the evidence does not support a finding that he committed a rape. In his brief petitioner set forth the five factors in evidence which tended to prove rape and four factors in evidence which tended to disprove rape.

The South Carolina Supreme Court found the evidence sufficient to create a question for the jury. It is a well-settled principle of law in this state that the "trial court is concerned only with the existence of evidence, not its weight." State v. Butler, 277 S.C. 452, 290 S.E.2d 1, at 4 (1982). "Any evidence direct or circumstantial reasonably tending to prove the

guilt of the accused creates a jury issue." (emphasis added). State v. Butler, 290 S.E.2d 1, at 4. Therefore, the five pieces of evidence which tended to prove rape created a jury issue and provided a basis on which a rational factfinder could have arrived at an opinion that, beyond a reasonable doubt, petitioner committed rape. The standard applied by a federal habeas corpus court in determining the sufficiency of the evidence neither permits a court to make its own subjective determination of guilt or innocence, nor requires scrutiny of the reasoning process actually used by the factfinder. Jackson v. Virginia, 443 U.S. 307 at fn. 13 (1979). Sufficient evidence existed in the record that the case should have been submitted to the jury on the aggravating circumstance of rape. There has been no constitutional infringement in this regard.

9. DENIAL OF PETITIONER'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS BY USE OF AN IMPERMISSIBLE DEFINITION FOR THE TERM REASONABLE DOUBT.

Unlike jury instructions which are based on state law, instructions as to reasonable doubt may rise to the level of constitutional concern. All criminal defendants are considered innocent until proven guilty beyond a reasonable doubt, a basic tenet of the due process guaranteed all people by the Fifth and Fourteenth Amendments. The Supreme Court has never specifically considered the propriety of instructions which define reasonable doubt, although it has noted that the attempt to define "reasonable doubt" has been criticized. See Taylor v. Kentucky, 436 U.S. 478, 488 (1978), and cites therein. The consensus among

courts is that "reasonable doubt" is a phrase generally understood by laymen, which needs no further definition.

The judge in the instant case defined reasonable doubt three times. During the guilt phase, he instructed the jury that it was

> ... a doubt for which you have a real reason, not a frivolous doubt, not a whimsical, fanciful doubt, because you can doubt any proposition if you wanted to, but a reasonable doubt is a substantial doubt for which an honest person seeking the truth can give a real reason. (Tr. 940, line 24-941, line 3).

During the sentencing phase, he redefined reasonable doubt using the same language. (Tr. 1022, lines 12-16.) After instructing the jury as to circumstantial evidence, the trial judge again defined reasonable doubt in the following manner:

> The two phrases "beyond a reasonable doubt" and "proof to a moral certainty" are basically synonymous and they are the legal equivalent of each other. These phrases, however, connote a degree of proof which is distinguished from an absolute certainty. Proof beyond a reasonable doubt, which the law in its mercy requires for the benefit of the accused, is not a weak or slight doubt, but it is a serious or strong or substantial well-founded doubt as to the truth of the matters asserted by the state. (Tr. 1026-1027).

Petitioner accurately asserts that several courts have overturned convictions where a trial judge has defined reasonable doubt in such a manner that the defendant's burden of proof was increased. Smith v. State, 247 S.E.2d 925 (Tenn. 1977); and State v. Davis, 482 S.W.2d 486 (Mo. 1972). Those cases disapproved instructions which equated reasonable doubt with "substantial" doubt. The Fourth Circuit Court of Appeals has considered this issue in Smith v. Bordenkircher, 718 F.2d 1273, cert. denied, 104 S. Ct. 2355 (1983); and in Murphy v. Holland, 776 F.2d 470 (4th Cir. 1985). In both cases, that court agreed that the instructions were ill-advised, but declined to overturn the convictions. The instructions given in Murphy are similar to those used here, but the Court upheld their use. In essence, although the federal courts may deplore the attempts to define reasonable doubt, that assertion alone is not sufficient to warrant granting the writ of habeas corpus.

10. DENIAL OF PETITIONER'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS BY THE TRIAL JUDGE'S FAILURE TO INSTRUCT THE JURY ABOUT THE CONSEQUENCES OF A NON-UNANIMOUS RECOMMENDATION OF SENTENCE.

The jury was told by the trial court that a recommendation of either the death penalty or of life imprisonment must be made by a unanimous verdict of the jury. Under South Carolina law, only the recommendation of the death penalty need be unanimous. S. C. Code Ann. § 16-3-20(c) (1976, as amended). Petitioner contends this incorrect instruction undermined the reliability of the sentencing proceeding required by Woodson v. North Carolina, 428 U.S. 280, at 303 (1976), because the instruction injected an arbitrary element into the jury deliberations.

After the sentencing verdict was returned, the jury was polled by the trial judge. All the jurors indicated that they agreed with and voted for the death penalty. This Court is unable to discern any prejudice resulting from the trial judge's failure to more fully instruct the jury on the consequences of their deliberations procedure. Habeas relief will not be granted based on speculative injury only.

11. DENIAL OF PETITIONER'S EIGHTH AMENDMENT RIGHTS TO AN APPROPRIATE REVIEW OF HIS DEATH SENTENCE.

S.C. Code Ann. § 16-3-25(c)(3) requires the South Carolina Supreme Court to review every death sentence and determine "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

In its proportionality reviews, the state supreme court has chosen to compare a given death penalty case only with other death penalty cases. Petitioner asserts that his case should be compared with any case similar in circumstances, including those where the death penalty was not imposed.

"Although a comparative proportionality review may be a safeguard against arbitrarily imposed death sentences, it is not required under the Constitution." Shaw v. Martin, 733 F.2d 304, at 317 (4th Cir. 1984); citing Pulley v. Harris, 465 U.S. 37 (1984). Absent constitutional protections, the necessity and sufficiency of proportionality review remains a question of state law. Shaw, supra.

12. DENIAL OF PETITIONER'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS BY THE IMPERMISSIBLE JURY INSTRUCTION PRESUMING MALICE FROM THE USE OF A DEADLY WEAPON.

Petitioner argues that the judge's charge on malice impermissibly "presumed away" an element of the offense of murder when he charged:

> Malice may also be inferred or presumed from the use of a deadly weapon in the commission of the homicide. (Tr. 943).

Petitioner cites Francis v. Franklin, 471 U.S. 307 (1985), and Sandstrom v. Montana, 442 U.S. 510 (1979), in support of this exception. Francis speaks of three types of presumptions. The

first type is a mandatory or irrebuttable presumption, where the fact is presumed if the state proves certain predicate facts. This presumption is unconstitutional because it totally removes the presumed element of the crime from the case. Francis, supra, at 355, n.5. The second type of presumption is a mandatory rebuttable presumption. These are usually considered unconstitutional because they shift the burden of proof to the defendant. A rebuttable presumption may be constitutional if it shifts only the burden of production to the defendant, not the burden of persuasion. Sandstrom, at 515. If the instruction could be interpreted by a reasonable juror as requiring the defendant to prove by any degree of proof that the element of the crime is not present, then the State has been relieved of its responsibility and the instruction is unconstitutional. Sandstrom, at 517.

The third type of presumption is called a "permissible inference," which may be constitutional because

> ... it still requires the State to convince the jury that the suggested conclusion should be inferred based on the predicate facts proven. Franklin, at 353.

A permissive inference may still be unconstitutional if the conclusion would not be naturally drawn from the predicate facts. See Ulster County Court v. Allen, 442 U.S. 140, 157-163 (1979).

The Supreme Court in Franklin, supra, found that the jury there was instructed that the presumption could be rebutted, but held that this charge still had the effect of shifting the burden of proof to the defendant. Franklin, at 355.

The charge to which petitioner excepts is a permissive inference. It instructs the jury that if the crime was committed with a deadly weapon, the jury may infer, or presume, malice.

The Francis Court also instructs that "the potentially offending words must be considered in the context of the charge as a whole." 105 S.Ct. at 1971. Therefore, other portions of the charge must also be considered to determine if they mitigate the potential harmful impact of the suspect portion. The jury was also told

> I hasten to tell you that even if the facts proven in the case are such as to give rise to the inference or implication of malice, that implication is strictly rebuttable. (Tr. 943, lines 13-16).

At this point, the instructions would have read as a mandatory rebuttable presumption. The trial judge continued, however, to water down the presumption.

> It is not binding on you ladies and gentlemen as a matter of law. And when all of the facts and circumstances surrounding the use of a deadly weapon in a homicide have been brought out and presented to a jury, the presumption itself vanishes and it then remains as it always does, your responsibility to make a determination under the facts and circumstances which have been proven to you: Did the defendant have malice ... in his heart and in his mind at the time of the infliction of the fatal injury. (Tr. 943, lines 16-24).

The charge, taken as a whole, creates no more than a permissive inference allowed by Ulster County Court v. Allen, 442 U.S. 140 (1979).

13. DENIAL OF PETITIONER'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS BY VIRTUE OF THE TRIAL JUDGE'S CHARGING THE DEFINITION OF RAPE IN LIEU OF THE DEFINITION OF CRIMINAL SEXUAL CONDUCT DURING THE SENTENCING PHASE OF PETITIONER'S TRIAL.

In 1977 the rape statutes, S.C. Code Ann. §§ 16-3-630 to

16-3-650, were replaced by statutes which defined criminal sexual conduct. Petitioner was tried for murder in early 1981. At the time of petitioner's trial, the death penalty statute listed rape as an aggravating circumstance (S. C. Code Ann. § 16-3-20), but the rape statute had been replaced with one for criminal sexual conduct. Neither side here disputes that petitioner could not have been charged with rape since the statute had been repealed. Petitioner here argues two things: first, that the trial court was without jurisdiction to use a repealed statute in determining his sentence; and second, that use of the rape statute relieved the state of its burden of proof on all elements of the offense.

At the time of the incident, the behavior in question was a crime under either statute (rape or criminal sexual conduct). Only the name of the crime had been changed. The South Carolina Supreme Court has determined that the legislature meant for the two terms, rape and criminal sexual conduct, to be used interchangeably. State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983). Their interpretation of state law is not subject to review by a federal court unless petitioner can demonstrate that his constitutional rights were violated by this interpretation. Chance v. Garrison, 537 F.2d 1212 (4th Cir. 1976).

In support of the above issue, petitioner asserts that substitution of the rape statute for that on criminal sexual conduct relieved the state of its burden of proving all elements of the crime.

Rape was defined as the carnal knowledge of a woman by force and without her consent. Criminal sexual conduct is defined as

sexual battery accompanied by aggravated force. Petitioner has claimed that criminal sexual conduct requires the state to prove the additional element of aggravation.

A comparison of the two definitions confirms the state supreme court's conclusion that the two terms are synonymous. The State still had to prove the existence of an act of sexual intercourse, accompanied by some force either actual or threatened. Therefore, the State was not relieved of proving any element of criminal sexual conduct by the trial judge's charge on rape.

14. DENIAL OF PETITIONER'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS BY THE TRIAL JUDGE REFUSING TO CHARGE CIRCUMSTANTIAL EVIDENCE.

At the end of the guilt phase of the trial, the judge refused to charge the jury on circumstantial evidence. The petitioner argues that if the jury chose to disregard his confession as being involuntary, the only remaining evidence was circumstantial, thus necessitating the requested instruction.

Where the state relies upon direct evidence a trial judge may properly refuse to charge circumstantial evidence. State v. White, 272 S.C. 384, 252 S.E.2d 294 (1979).

At trial three witnesses, Larry White, Shirley Williams and Curtis Williams, all testified that the petitioner told them he had killed a girl on a Moped. Although their recital of events differed from petitioner's confession, their testimony represents direct evidence of the petitioner's culpability. Sufficient direct evidence was admitted to place the trial judge's refusal

of the charge within the parameters of his discretion under South Carolina law.

Additionally, an instruction on circumstantial evidence is not constitutionally mandated where adequate instructions as to reasonable doubt have been given. Holland v. United States, 348 U.S. 121 (1954).

15. DENIAL OF PETITIONER'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS BY FAILURE OF THE TRIAL JUDGE TO RULE ON THE PETITIONER'S CLAIMS THAT THE STATEMENT TAKEN FROM HIM WAS NOT THE PRODUCT OF A FREE AND VOLUNTARY WAIVER.

Horace Butler was arrested the night of August 30, 1980 on an unrelated charge of assault and battery with intent to kill for an incident which occurred several weeks earlier. (Tr. 34). That charge was later dismissed. (Tr. 118). The four officers who arrested him were the same four who were present when he confessed to the murder of Pamela Lane. Twenty-four hours later, at about 8:30 p.m. on August 31, he appeared with his attorney at a bond hearing on the unrelated assault charge. After the bond hearing, he was returned to the Charleston County Jail. Butler's attorney contends that after the bond hearing he told the officers not to question Horace (on the unrelated assault charge). The officers have stated that they do not remember such an instruction. Approximately four hours later, at 12:15 a.m. on September 1, 1980, he was taken from the jail to Charleston County Police Headquarters. Between 12:50 a.m. and 2:55 a.m., he was questioned about the death of Pamela Lane and made his first statement, in which he stated that Larry White killed Pamela Lane, but that he (Butler) helped hide the Moped.

Between 2:55 a.m. and 5:45 a.m., Butler changed his first statement and confessed to the murder himself.

According to testimony given by police, Butler was never coerced or intimidated in any way. He was informed, however, that Larry White had already talked to the police. He was asked at the jail if he wanted to go to police headquarters. (Tr. 41). Prior to any interrogation the police informed Butler that they were charging him with the murder and kidnapping of Pamela Lane. (Tr. 42). They inquired whether Butler was sleepy and whether he was under the influence of any drugs or medication. (Tr. 42). The officers read him his Miranda rights and explained each of the individual rights sequentially. (Tr. 44). According to the police Butler indicated that he understood his rights. (Tr. 45). He signed two separate waivers of those rights during the course of the interrogation. (Tr. 44-45, 48 and 56). Two or three thirty minute breaks were provided throughout the five hour period during which the police and petitioner consumed coffee, water and doughnuts. (Tr. 54 and 62). The officers testified that Butler was never alone with a single officer during the course of the interrogation. (Tr. 54 and 114). Throughout the conversations Butler was responsive to the officers' questions. (Tr. 70). After signing the second confession at 5:45 a.m., Butler indicated again that he was not tired and voluntarily led officers to the scenes where he intercepted the victim, where the sexual intercourse and shooting occurred and where he dumped the body. (Tr. 63). He was returned to the jail at about 10:30 a.m. on September 1, 1980.

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Butler's version of the events varies considerably. He claims that when an officer arrived at the jail to pick him up, he was told he might be going home. (Tr. 97-98). After his arrival at police headquarters, he asserts the police abused him verbally and physically. He claims the officers threatened to arrest his whole family. (Tr. 100).[2]

After hearing testimony at the suppression hearing from Butler, the police officers involved, and Butler's former school principal, who testified about Butler's low intelligence level (Tr. 91-94), the trial judge made the following findings of fact (Tr. 122-123):

A. Defendant-petitioner was afforded his Fifth Amendment rights required by Miranda; and

B. The statements he gave were voluntary and admissible at trial.

Petitioner now asserts that his Fifth and Sixth Amendment rights to counsel were violated and raises three specific questions as to this issue:

A. Whether the right to counsel had attached;

B. Whether petitioner effectively waived that right; and

C. Whether police conduct violated that right.

Those questions also require that we consider whether or not petitioner's confession was voluntary.

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2 Petitioner's father was arrested and charged with being an accessory after the fact, relating to Lane's murder, on September 1, 1980. (App. 30).

> [T]he ultimate question of whether, under the totality of the circumstances, a challenged confession was obtained in a manner compatible with the requirements of the Constitution to be a matter not entitled to a presumption of correctness under 28 U.S.C. § 2254(d) but rather a matter for independent federal determination. Miller v. Fenton, ___ U.S. ___, 106 S. Ct. 445, 88 L.Ed.2d 405 (1985). In so holding the Court recognized that "subsidiary factual questions such as ... whether in fact the police engaged in the intimidation tactics alleged by the defendant ... are entitled to the § 2254(d) presumption." Miller, 106 S. Ct. at 451.

Frederick Wayne Thomas v. Nathan A. Rice, et al., Op. No. 85-7552, at p.5 (4th Cir. 5/14/87).

A. Petitioner's Sixth Amendment Right to Counsel.

Despite contradictory versions of the events which occurred August 30 through September 1, 1980, several facts emerge uncontradicted. All of the events prior to midnight of August 31 (Butler's arrest, detention, retention of counsel, and bond hearing) apparently pertained only to the unrelated assault charge. All events occurring after midnight of August 31 (Butler's removal from jail, interrogation, and confession) related to the eventual murder charge. Attention apparently shifted to Butler because White was also in custody and had implicated Butler (Tr. 53), but the record is completely devoid of any indication as to when police attention focused on Butler. However, there is no evidence that there was any subterfuge by the police in charging Butler on the original (unrelated) assault charge.

Butler was informed at the start of the interrogation that "Right now we are charging you with murder and kidnapping." (Tr. 42, line 8). According to police accounts, he thereafter waived

his right to counsel and his right to remain silent and, eventually, confessed to the crime.

There are several questions raised by these facts. The right to counsel attaches at the start of a custodial interrogation in order to safeguard a suspect's right to be free of self-incrimination under the Fifth Amendment. Miranda v. Arizona, 384 U.S. 436 (1966). The separate right to counsel under the Sixth Amendment does not attach until a suspect has formal proceedings initiated, usually by arraignment. Moran v. Burbine, ___ U.S. ___, 106 S. Ct. 1135 (1986). Specifically, the right to counsel under the Sixth Amendment does not exist prior to "the initiation of adversary judicial criminal proceedings - whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." United Staes v. Gouveia, 467 U.S. 180, 188, quoting Kirby v. Illinois, 406 U.S. 682, 688-689 (1972). The right may attach as early as the time of arrest, United States v. MacDonald, 456 U.S. 1, 6-7 (1982), but the Court in Gouveia, supra, at 190, declined to hold that an arrest always triggers the right to counsel. In short, a defendant has a right to counsel under both the Fifth and Sixth Amendments, but that right attaches at different times under each Amendment. See discussion in Michigan v. Jackson, ___ U.S. ___, 106 S. Ct. 1404 (1986). A series of recent Supreme Court cases, including Moran v. Burbine and Michigan v. Jackson, supra, have discussed when and under what circumstances a suspect's Sixth Amendment right to counsel attaches.

One decision is particularly close to the facts in the instant case. In Maine v. Moulton, 106 S. Ct. 477 (1985), a suspect had been indicted for one crime, but was out on bond awaiting trial. A co-defendant offered to act as an informer and police arranged to record conversations between the two men. Evidence was gathered in this manner both as to the first crime and as to a second, planned crime. The Court, in a decision written by Justice Brennan, held that the information gathered in this manner was inadmissible as to the first crime because the suspect's Sixth Amendment right to counsel had attached when he was formally charged with the crime, and thereafter, police could not act in any way which circumvented that right. The Court also held, however, that the evidence gathered as to the second crime would be admissible in a trial on those charges, because the right to counsel had not yet attached as to that crime. Maine v. Moulton, supra, n. 16. In short, the Sixth Amendment right to counsel attaches separately for each crime, and its existence for one charge does not "carry over" to another charge.

In the instant case, petitioner's separate right to counsel under the Sixth Amendment had attached as to the unrelated assault charge, but as to the murder charge, no event which triggers the right to counsel had yet occurred.[3]

B. Petitioner's Fifth Amendment Rights.

Petitioner's Fifth Amendment rights attached, however, at the time of his arrest, when he was taken into custody. Part of

[3] The arrest warrant was not issued until after petitioner gave a statement. (App. 437-440).

petitioner's Fifth Amendment rights include the right to counsel to protect his privilege against self-incrimination, but that right may be waived along with other protections offered by the Fifth Amendment. North Carolina v. Butler, 441 U.S. 369 (1979).

One question is whether police had the right to initiate questioning about the murder knowing petitioner had retained an attorney for the assault charge. Police may reinstitute questioning after a suspect has requested an attorney, as long as an attorney has been available to the suspect in the interim. U.S. v. Halliday, 658 F.2d 1103 (5th Cir. 1981), cert. denied, 454 U.S. 1127 (1981). In short, if a suspect requests an attorney and is allowed to see one, police may thereafter attempt further questioning despite the absence of counsel.[4] The suspect still has the right to remain silent or to terminate the questioning, but police are not prohibited from periodically inquiring if the suspect will talk. Michigan v. Mosley, 423 U.S. 96 (1975). In Mosley, a suspect arrested on a robbery charge was given his Miranda warnings and specifically declined to talk to police officers. Several hours later, he was again given his Miranda warnings and questioned about a murder, to which he confessed. Mosley, supra, at 98. The Court allowed the use of that confession because Mosley never attempted to invoke his Fifth Amendment rights during the second questioning about a

[4] Most fact situations in the cases reviewed are similar to the situation here. The defendant's attorney was not present, but defendant did not request his presence, in spite of being given another set of Miranda warnings, nor did defendant attempt to cut off questioning in any other manner.

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different crime. Specifically, the second interrogation did not undercut defendant's earlier decision not to answer inquiries about the first crime, and the questioning focused only on a crime different in time, place and nature from the first crime.

Petitioner refers this Court to United States, ex rel. Espinoza v. Fairman, 813 F.2d 117 (7th Cir. 1987). For purposes of this inquiry, whether police may initiate an interrogation after the Fifth Amendment right to counsel has attached, Espinoza presents an identical factual situation to the instant case. The Seventh Circuit Court of Appeals affirmed the habeas relief granted below for different reasons. The court of appeals granted relief on the ground that the police violated Espinoza's Fifth Amendment right to counsel by initiating an interrogation after Espinoza had impliedly invoked his Fifth Amendment right to counsel by accepting an attorney at a previous arraignment on an unrelated charge. The Court held that Espinoza's waiver, even if otherwise valid, was ineffective since the police violated the prophylactic rule established by Edwards v. Arizona, 451 U.S. 477 (1981), when they initiated the interrogation.

This Court need not consider the propriety of the principles established in Espinoza inasmuch as the underlying ruling in Edwards v. Arizona may not be applied retroactively. Solem v. Stumes, 465 U.S. 638 (1984). Petitioner was convicted January 24, 1981. The sentencing phase of his trial was concluded on January 26, 1981. Edwards was decided May 18, 1981.

Having concluded that the police did not wrongfully reinstitute questioning, the next issues that must be resolved

are whether petitioner made both a voluntary and a knowing and intelligent waiver of his Fifth Amendment right to counsel. These are separate inquiries. Wilson v. Murray, 806 F.2d 1232 (4th Cir. 1986).

A confession cannot be held involuntary and therefore inadmissible under the Due Process Clause unless it is linked to coercion by government agents. Colorado v. Connelly, ___ U.S. ___, 107 S. Ct. 523 (1986).

Many of the crucial facts concerning this inquiry are disputed. The police repeatedly testified that they read and explained petitioner's Miranda rights to him. The officers also stated that neither verbal nor physical abuse occurred during the interrogation. Furthermore, they contended, no one officer was ever alone with the petitioner. Ostensibly, the reason for this policy is to guard against the coercive conduct alleged here by an overzealous officer.

In direct contradiction, the petitioner testified that he was beaten and verbally abused. His statements regarding physical abuse are significantly undermined by the fact that his attorney visited the petitioner within one hour of his return to jail. (Tr. 108). Despite this narrow time lapse the attorney did not attempt to testify about the petitioner's condition at that time or the presence of any marks from the alleged abuse. Petitioner's credibility is hampered further by his inconsistent statements relating to advice from his attorney. At the suppression hearing the petitioner did not remember his attorney telling him not to speak to the officers. (Tr. 96, ln. 25). Yet

at the post-conviction relief hearing, he clearly remembered the admonition. (App. 222, ln. 8).

An undisputed fact of importance remains that the petitioner signed two waiver of rights forms.

According to Miller v. Fenton, ___ U.S. ___, 106 S. Ct. at 451 (1986), a trial judge's conclusion that the police did not engage in intimidation tactics is entitled to the § 2254(d) presumption of correctness. At the suppression hearing the trial judge ruled that the confession was voluntary. (Tr. 121).

This Court concludes based on the record and the trial judge's ruling that the statements were voluntarily given.

We must next consider whether the waiver of the right to counsel was a knowing and intelligent waiver. We need not decide whether petitioner's decision was wise, but only whether it was made with an understanding of the protections involved.

According to the police, Butler was alert and responsive throughout the interrogation. (Tr. 42, 62, 63, 70). He appeared to understand and assented to his understanding of his Miranda rights as those rights were explained to him. (Tr. 44-45). Despite the petitioner's statements at his post-conviction relief hearing that he did not know what a confession or a jury trial were (App. 229-230), this Court concludes that Butler possessed the ability to understand and comprehend his legal rights. Both the petitioner and his attorney indicated that Butler actively participated in his trial and the negotiations preceding the trial. Petitioner discussed the following topics at length with his attorney: the events of his interrogation (App. 229-230),

guilty plea negotiations (App. 234-235), selection of witnesses and the substance of their testimony (App. 231-232) and the strategic implications of his testimony (App. 237).

Additionally, the petitioner and his elementary school principal, Isiah Frazier, testified tht he possessed some literacy skills. (App. 208; Tr. 93). Lastly, the petitioner was not unfamiliar with police procedure. He testified that he had been arrested on four previous occasions. (Tr. 104).

Based on this testimony, this Court concludes that the petitioner made a knowing waiver of his right to counsel. Having made a valid waiver of his Fifth Amendment rights, petitioner was not entitled to an attorney under the Fifth Amendment. His Sixth Amendment right to counsel had not yet attached for the murder charge since no formal proceedings in the prosecution of that charge had been instituted.

CONCLUSION

After reviewing the record, the applicable law, and the Magistrate's Report, which is hereby adopted in full, the Court finds that there is no genuine issue as to any material fact and that the respondents are entitled to judgment as a matter of law.

IT IS, THEREFORE, ORDERED that the respondents' motion for summary judgment be and hereby is granted and this case is dismissed.

IT IS SO ORDERED.

G. Ross Anderson Jr.
G. ROSS ANDERSON, JR.
UNITED STATES DISTRICT JUDGE

Anderson, South Carolina
June 5th, 1987.

A TRUE COPY
Attest: Ann A. Birch, Clerk
By: _____
Deputy Clerk

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APPENDIX B

that might have sent mixed signals regarding his continuing right to request counsel. Certainly, if Butler had been released on bond and then rearrested an hour later on murder charges, the authorities would have been permitted to engage in proper interrogation. We see no reason for a different result simply because the custody was continuous.

Properly initiated interrogation on entirely new charges does not intrude into an accused's previously invoked rights but rather offers that accused an opportunity to weigh his rights intelligently in light of changed circumstances. When, as occurred in this case, the accused then freely waives any constitutional right to counsel and provides voluntary statements of an incriminating nature, there is no justification for undermining the search for truth by suppressing those statements.

Unlike the Seventh Circuit, we perceive no conflict between this conclusion and the Supreme Court's reasoning in *Colorado v. Spring, supra*. A voluntary waiver of rights by an accused in custody conclusively demonstrates that the accused does not find the general custodial atmosphere unduly coercive. The coercive nature of the custodial environment does not change simply because the subject of the interrogation shifts. There is, therefore, as the Court in *Spring* recognized, no reason why the authorities should renew the *Miranda* warnings each time a new topic is raised in interrogation. The accused has received all of the "prophylactic" protection to which he is entitled.

The scope of the invoked fifth amendment right to counsel presents an entirely distinct conceptual issue. The question is no longer whether the authorities have met their responsibility, but whether the accused wishes to deal with the authorities personally or through counsel. Knowledge of the charges is clearly relevant in this area. Logically, the decision to seek counsel may change depending upon the accused's assessment of his circumstances. There is, therefore, no compelling reason to assume that the invocation of a right to counsel on one offense automatically applies to later charges brought to the attention of the accused. Certainly, there is no reason why the authorities cannot, at least, inquire if the accused wishes to deal with the new charges through counsel.

This Court has recently expressed serious reservations concerning the use of *per se* reversal rules in federal habeas proceedings. *Perry v. Leeke*, 832 F.2d 837 (4th Cir.), *cert. granted*, — U.S. ——, 108 S.Ct. 1269, 99 L.Ed.2d 480 (1988). While a federal habeas court must ensure that a petitioner's constitutional rights have been scrupulously observed, it must also be aware of societal cost attendant to a reversal of a state criminal conviction. Fidelity to the law, of course, demands adherence to established "bright line" *per se* rules such as that articulated in *Edwards* even when they result in reversal of otherwise valid criminal convictions. Unlike the Seventh Circuit, however, we are not inclined to extend those rules to circumstances where they are unjustified and unnecessary.

III.

We are, therefore, fully satisfied that petitioner's confessions, preceded by appropriate warnings and a voluntary waiver of fifth amendment protections, were not obtained in violation of his constitutional rights or the prophylactic rule of *Edwards v. Arizona*. Accordingly, the denial of habeas relief to petitioner is affirmed.

AFFIRMED.

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Corp., 198 Va. at 160, 93 S.E.2d at 279. As the district court noted, while the references to the order of events may not be entirely accurate, the quoted portions of the sentences are accurate quotes and the sentences themselves are substantially correct accounts of the trial testimony. Though a showing of actual malice by clear and convincing evidence could overcome privilege, *see The Gazette, Inc. v. Harris*, 229 Va. 1, 18, 325 S.E.2d 713, 727 (1985), *cert. denied*, 472 U.S. 1032, 105 S.Ct. 3513, 87 L.Ed.2d 643 (1985), there is nothing in the record before us from which we could infer malice. Therefore, the qualified privilege applies and the summary judgment in favor of The New Yorker is hereby affirmed.

AFFIRMED IN PART, REMANDED IN PART.

Horace BUTLER, Petitioner-Appellant,

v.

James AIKEN, Warden, Central Correctional Institute; Travis Medlock, Attorney General, State of South Carolina, Respondents-Appellees.

No. 87-4004.

United States Court of Appeals, Fourth Circuit.

Argued Jan. 7, 1988.

Decided May 6, 1988.

Defendant petitioned for habeas corpus relief alleging errors in state murder trial which resulted in his conviction and death sentence. The United States District Court for the District of South Carolina, George Ross Anderson, Jr., J., dismissed petition. Defendant appealed. The Court of Appeals, K.K. Hall, Circuit Judge, held that police-initiated questioning of defendant about murder did not intrude on defendant's previously invoked right to counsel on unrelated charge of assault where arrest on assault charges was not a sham and there was no reinterrogation on same offense.

Affirmed.

1. Courts ⇐100(1)

Rule in *Edwards v. Arizona* that accused is not subject to further police-initiated interrogation, after he has expressed desire to deal with police only through counsel, until counsel has been made available to him, although not retroactive, does apply to cases pending on direct appeal at time it was announced by United States Supreme Court. U.S.C.A. Const.Amend. 5.

2. Criminal Law ⇐412.2(4)

Police-initiated questioning of suspect about murder did not intrude on suspect's previously invoked right to counsel on unrelated charge of assault and battery where arrest on assault charges was not a sham and there was no reinterrogation on same offense. U.S.C.A. Const.Amend. 5.

Dale Thomas Cobb, Jr. (Belk, Howard, Cobb & Chandler, P.A., on brief). for petitioner-appellant.

Donald John Zelenka, Chief Deputy Atty. Gen., for respondents-appellees.

Before RUSSELL, HALL, and CHAPMAN, Circuit Judges.

K.K. HALL, Circuit Judge:

Horace Butler, a South Carolina inmate currently awaiting execution for the crime of murder, appeals an order of the district court dismissing his petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. We affirm.

I.

Butler was tried by a South Carolina state court in 1981 for the 1980 murder of Pamela Lane. According to the facts developed at trial, Lane, a clerk at a convenience store north of Charleston, South Carolina, was last seen alive when she left her place of employment at approximately 10:30 p.m. on July 17, 1980. At that time, she was riding a new moped that had been delivered to her earlier that evening. She never arrived at her home.

The next morning, Lane's sister reported her disappearance to the authorities. A few hours later, near a bridge, fishermen discovered a body which was subsequently identified as that of Pamela Lane. She had been shot once in the chest by a small caliber gun. The following day a local minister found a moped submerged in a pond behind his church. The moped was identified as the one Lane was riding when last seen.

On August 30, 1980, Butler was arrested on an unrelated charge of assault and battery and placed in the Charleston County Jail. Butler retained local counsel who appeared with him at a bond hearing on August 31, 1980. He was unable to make bond, however, and was returned to custody in the County Jail. Butler's attorney would later contend in state post-conviction proceedings that he directed police officers not to question Butler further. The officers, however, testified that they remembered no such instruction.

At approximately 12:15 a.m. on September 1, 1980, Butler was taken from the jail and transported to the Charleston County Police Department. He was then informed for the first time that he was under suspicion for the murder of Pamela Lane. After receiving the warnings regarding his constitutional protection against compulsory self-incrimination, as required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), Butler indicated that he understood his rights and signed two separate waiver forms. At no time during the ensuing interrogation did Butler request the presence of his attorney.

Butler subsequently offered two explanations of Lane's death. In his first confession, he claimed that a friend, Larry White, had killed Lane and then sought his help in disposing of the moped. When police told Butler that they did not believe the story, he offered a second confession in which he admitted to killing Lane. According to the second confession, Butler saw Lane riding on her moped and followed her. When he blinked his automobile lights at her, she pulled off the road, hid the moped in the bushes, and voluntarily accompanied him in a drive to a nearby wooded area. Butler claimed that Lane engaged in consensual sex with him and then threatened to "cry rape" when she realized that she would be late getting home. Butler maintained that he panicked, shot Lane with a handgun in his possession, and then dumped her body off a bridge. He further claimed that Larry White helped him dispose of the moped. Butler later took police to the area where the events allegedly occurred and identified the location of Lane's death.

Butler was subsequently indicted and brought to trial on the charge of murder in the first degree. After a motion to suppress his custodial statements was denied, his two confessions to the Charleston police were introduced into evidence. The jury found him guilty of Lane's murder and, in a separate proceeding, sentenced him to death after concluding the murder had occurred while the defendant was engaged in the crime of rape.

Butler's conviction was upheld on direct appeal to the South Carolina Supreme Court in 1982. A petition for a writ of certiorari was denied by the United States Supreme Court in that same year. In 1983, Butler unsuccessfully petitioned for state post-conviction relief. That denial of relief was also affirmed by the South Carolina Supreme Court, and the United States Supreme Court again denied a petition for certiorari. Butler thereby exhausted his available state remedies.

On May 2, 1986, Butler filed the instant petition for federal habeas relief pursuant to 28 U.S.C. § 2254. The matter was referred to the United States Magistrate for

report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). On May 9, 1987, the magistrate issued his report finding no basis for granting relief to Butler. The magistrate also recommended that a motion for summary judgment presented on behalf of the respondent state officials be granted. After conducting a lengthy *de novo* review of all portions of the magistrate's report to which Butler had objected, the district court also concluded that petitioner did not merit habeas relief. Accordingly, the district court granted the respondent's motion for summary judgment and dismissed the petition. This appeal followed.

II.

On appeal, petitioner contends that he is entitled to habeas relief because (1) his counsel in the proceedings below was constitutionally ineffective; (2) errors in the jury selection process violated his rights under the sixth and fourteenth amendments; (3) his two confessions were improperly admitted at trial; (4) the jury at his trial was improperly instructed; (5) the prosecution's use of rape as an aggravating circumstance justifying the death penalty was improper; and (6) the state of South Carolina failed to conduct an adequate proportionality review of his case to determine whether the death penalty was the appropriate punishment. All of these contentions were exhaustively considered and rejected by the district court. We find the district court's analysis sound and persuasive in all respects save its treatment of the admissibility of petitioner's confessions. On that single issue, we conclude that some further discussion is necessary. On all other claims advanced by petitioner, however, we affirm the denial of habeas relief for the reasons expressed by the district court. *Horace Butler v. James Aiken, Warden, Central Correctional Institution, and Travis Medlock, Attorney General, State of South Carolina*, C/A No. 86-1093-3 (D.S.C. June 9, 1987).

With regard to his confessions, Butler contends that the statements elicited from him by the Charleston Police on September 1, 1980, were obtained in violation of his fifth amendment right to counsel. He concedes that the warnings mandated by *Miranda v. Arizona, supra*, were given before any interrogation concerning Lane's death occurred. He further concedes that he signed waivers in which he agreed to permit police questioning without the presence of an attorney. Petitioner argues, however, that under the "bright line" rule established in *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), the undisputed invocation of his fifth amendment right to counsel when he was first arrested barred the police from initiating any further uncounseled interrogation. The waiver forms were, in petitioner's view, presumptively invalid.

[1] Noting that Butler's trial had preceded the decision in *Edwards* and that the Supreme Court in *Solem v. Stumes*, 465 U.S. 638, 104 S.Ct. 1338, 79 L.Ed.2d 579 (1984), had rejected retroactive application of the rule articulated in *Edwards*, the district court summarily rejected this portion of Butler's petition. Unfortunately, the district court's failure to address this claim on the merits must be regarded as error. Although *Edwards* does not have retroactive effect, it does apply to cases pending on direct appeal at the time it was announced. *Shea v. Louisiana*, 470 U.S. 51, 105 S.Ct. 1065, 84 L.Ed.2d 38 (1985). Butler's appeal was in fact pending at that time. We must, therefore, consider whether Butler's interrogation did produce incriminating statements in violation of his constitutional right to counsel. We are convinced that it did not.

[2] An immediate factual distinction may be drawn between Butler's interrogation and that of the criminal defendant in *Edwards*. The defendant therein was arrested on charges of first degree murder. After some preliminary questioning, he terminated the interrogation by requesting an attorney. The next morning, police officers approached the defendant and without

providing counsel, renewed questioning on the very offense on which he had previously requested counsel. In requiring suppression of the resulting confession, the Supreme Court held that when an accused has expressed a desire to deal with the police only through counsel, he "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards*, 451 U.S. at 484-85, 101 S.Ct. at 1885.

In the instant case, the Charleston police did not attempt to renew their inquiry into the assault and battery charges on which Butler had been arrested. Rather, the questioning initiated on September 1, 1980, dealt only with a hitherto uncharged offense—the murder of Pamela Lane. Not surprisingly, Butler argues on appeal that this factual distinction is irrelevant to the constitutional inquiry. Relying upon a recent decision from the Seventh Circuit, Butler contends that the correct application of *Edwards* requires that during continuous custody, the police refrain from any further questioning once an accused has invoked a right to counsel on any offense. *See United States ex rel Espinoza v. Fairman*, 813 F.2d 117 (7th Cir.1987). We are not persuaded, however, by the Seventh Circuit's dramatic extension of *Edwards*.

The fifth amendment right to counsel exists throughout the time that an accused is in police custody in contrast to the protection provided by the sixth amendment which arises only when formal proceedings are begun—when the individual becomes the accused.[1] *Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964). The court in *Espinoza* reasoned that since the right to counsel extended continuously through a period of custody, the invocation of that right, as protected by *Edwards*, must be of similar duration. The court further reasoned that requiring a crime-by-crime invocation of the fifth amendment right would be inconsistent with the decision in *Colorado v. Spring*, 479 U.S. 564, 107 S.Ct. 851, 93 L.Ed.2d 954 (1987) (waiver of fifth amendment right at the beginning of interrogation remains valid even if police questioning moves without warning from crime on which defendant was arrested to an entirely different offense). Although superficially appealing, we are convinced that the decision of the Seventh Circuit pursues a false symmetry while cutting the decision in *Edwards* away from its conceptual base.

As the Supreme Court has observed, the "prophylactic rule" adopted in *Edwards* "has only a tangential relation to truthfinding." *Solem*, 465 U.S. at 642, 104 S.Ct. at 1341. It was articulated as a reflection of the Court's belief that additional procedural safeguards were needed to protect an accused's preexisting right to request counsel during custodial interrogation. *Id.* at 645, 104 S.Ct. at 1342. Such "safeguards" by their inherent nature are a judicial response to specific and identifiable conditions that undermine the perceived integrity of the legal system. In *Miranda*, for example, the Court sought to insure that statements made by an accused while in the unavoidably coercive atmosphere of custodial interrogation could reasonably be viewed as truly voluntary. In *Edwards*, the Court's concern lay with police conduct that might badger an accused into abandoning a previously invoked right.

We fail to see how the actions of the Charleston police could fall within the intent of the Court in *Edwards*. There is no suggestion that Butler's arrest on the assault charges was a sham intended to make him available for questioning upon a more serious offense. Neither was there "reinterrogation" on the same offense, *Edwards*, 451 U.S. at 485, 101 S.Ct. at 1885,

1. On September 1, 1980, Butler unquestionably possessed a sixth amendment right to counsel with regard to the offense on which he had been arrested and denied bond. No formal charges had been filed against him in connection with Lane's death, however, and thus no sixth amendment right had arisen in that area. For that reason, it is essentially irrelevant whether Butler's counsel in fact instructed police not to question him further.

APPENDIX C

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U.S. Court of Appeals
Fourth Court

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 87-4004

Horace Butler

Petitioner - Appellant

versus

James Aiken, Warden, Central Correctional Institute, Travis Medlock, Attorney General, State of South Carolina

Respondents - Appellees

ORDER

Before the Court for reconsideration is Horace Butler's petition for rehearing with regard to his appeal of the district court's order denying his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Butler, a South Carolina inmate, was convicted in state court in 1981 for the 1980 murder of Pamela Lane. After exhausting state remedies, Butler petitioned for federal habeas relief asserting a broad range of constitutional objections to the state criminal proceedings. Finding no merit in any of his claims, the district court denied relief and we affirmed. Butler v. Aiken, No. 87-4004 (4th Cir. May 6, 1988). A petition for rehearing and suggestion of rehearing en banc was subsequently denied on June 15, 1988.

In our opinion, we rejected the bulk of Butler's contentions for the reasons soundly expressed below by the district court. We addressed, in detail, only Butler's claim that his confession resulting from interrogation on murder charges following his arrest and appearance with counsel on an unrelated offense violated the "bright line" rule against reinterrogation established in Edwards v. Arizona, 451 U.S. 477 (1981). Our conclusion that Edwards does not bar such interrogation if properly preceded by appropriate warning and waiver in accordance with Miranda v. Arizona, 384 U.S. 486, was cast into immediate and serious doubt by the Supreme Court's decision in Arizona v. Roberson, 56 U.S.L.W. 4590 (U.S. June 15, 1988). The Roberson Court expressly held that the Edwards rule does bar police initiated interrogation following a suspect's request for counsel in the context of a separate investigation. 56 U.S.L.W. 4593.

In light of Roberson, we determined that Butler's petition for rehearing should be reconsidered. Accordingly, we directed petitioner and respondents to file supplemental briefs on this issue. We have now received and examined that supplemental briefing. The petition for rehearing is, therefore, ripe for disposition.

As an initial matter, we reject respondents' effort to distinguish Roberson factually. We assume for purposes of decision that the appearance of counsel with Butler at a bond hearing on the assault charge for which he was first arrested conclusively demonstrated invocation of Butler's fifth amendment rights. The subsequent interrogation concerning the Lane murder, occurring during continuous custody, was contrary to the Edwards rule as modified in Roberson. If this case were before us on direct appeal, we would in all likelihood be compelled to reverse the conviction and remand for a new trial. It does not follow, however, that Butler is entitled to habeas relief based upon a rule of law that was not in effect at the time of his arrest and trial.

The retroactive effect of decisions such as Roberson in collateral proceedings is determined in accordance with three factors: (1) the purpose of the new rule of law; (2) the extent of reliance by law enforcement authorities on the old standard; and (3) the effect of retroactive application upon the administration of justice. Allen v. Hardy, ___ U.S. ___, 106 S.Ct. 2878, 2880 (1986). Although all are relevant, it is the first factor that is perhaps the most important for it is only when the new judicial formulation "enhances the accuracy of criminal trials" and "goes to the heart of the truth finding function," Solem v. Stumes, 465 U.S. 638, 643-45 (1984), that retroactivity is most appropriate.

Applying this test to the instant case, we are fully satisfied that Butler may not claim any retroactive benefit from Roberson. The Edwards-Roberson limitations on police interrogation have only the most tangential relationship to truth finding. They are, rather, a part of the prophylactic protection accorded the fifth amendment right to counsel as a means of establishing "guidelines to the law enforcement profession." Roberson, 56 U.S.L.W. at 4592. The interrogation of appellant, while unques-

tionably contrary to the present "guidelines, was conducted in strict accordance with established law in 1980. We, therefore, conclude that Butler may challenge his presumptively valid conviction only by demonstrating that there was an actual violation of his constitutional rights in 1980. On that dispositive issue, the record discloses no support for Butler's claim for habeas relief.

It is undisputed that local authorities provided full Miranda warnings before questioning Butler on the Lane murder. It is further undisputed that Butler twice evidenced his knowing consent to interrogation without the presence of counsel by executing signed waivers. Every court that has considered this matter has concluded that the waiver of rights was uncoerced and utterly voluntary. There is, therefore, no reason to find a technical violation based upon newly announced law when the record reveals that appellant freely waived any fifth amendment protections in 1980.

For the foregoing reasons, we conclude that our initial affirmance of the district court's decision in this matter was appropriate in substance.

In a requested poll of the Court on the suggestion for rehearing en banc, Chief Judge Winter, Judge Phillips, Judge Murnaghan, Judge Sprouse, and Judge Ervin voted to rehear the case en banc; and Judge Russell, Judge Widener, Judge Hall, Judge Chapman, Judge Wilkinson, and Judge Wilkins voted against rehearing en banc.

As the panel has considered the petition for rehearing and is of the opinion that it should be denied, and as a majority of the active circuit judges voted to deny rehearing en banc, it is ADJUDGED and ORDERED that the petition for rehearing and suggestion for rehearing en banc are denied.

ENTERED with the concurrences of Judge Russell and Judge Chapman.

/s/ K. K. Hall

K. K. Hall
U. S. Circuit Judge

WINTER, Chief Judge, dissenting:

I respectfully dissent from the denial of rehearing in banc because I believe that Butler's conviction was obtained in violation of applicable constitutional law. A life is at stake in this case. I have no doubt, therefore, that the validity of Butler's conviction presents a question of "exceptional importance." F. R. App. P. 35(a).

I.

As the majority correctly states, Butler requested counsel when questioned about the offense for which the authorities were holding him. Shortly thereafter, and in the absence of that counsel, Butler was interrogated about an unrelated offense. The government obtained from him self-incriminating statements about the unrelated offense. There is no evidence that Butler initiated the interrogation that resulted in his self-incriminating statements. He was convicted by the use of those statements.

The majority expresses the view that if Butler's case were before it on direct appeal, it would "in all likelihood" be compelled to reverse the conviction and remand for a new trial. But, the majority maintains, because Butler's case is before it on denial of a petition for habeas corpus, he is not entitled to relief, as the rule of law on which he relies to bar the use of his uncounselled confession was not in effect at the time of his arrest and trial. Specifically, the majority's view is that an interrogation such as Butler's did not violate Edwards v.

Arizona, 451 U.S. 477 (1981), until Edwards was "modified" in Arizona v. Roberson, 486 U.S. ___ (June 15, 1988). Because Roberson was not decided until after Butler's conviction became final, Butler is entitled to invoke Roberson, in the view of the majority, only if Roberson is held to be retroactive. The majority concludes that Roberson does not meet the test for retroactive application.

In making Butler's entitlement to relief depend upon the retroactivity of Roberson, the majority, in my view, incorrectly construes both Edwards and Roberson.

II.

Imprimis, I think that Butler's confession was constitutionally inadmissible under Edwards standing alone. Edwards stated unconditionally that a suspect who has "expressed his desire to deal with police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication." 451 U.S. at 484-85. It is true that, in Edwards, the subject about which the accused was wrongly interrogated was the crime for which the authorities were holding him. But there is not the slightest suggestion in the Court's opinion that its holding was limited by the subject of the interrogation. Indeed, the Court in Edwards expressly reconfirmed its previous characterization of the rule in Miranda v. Arizona, 384 U.S. 436 (1966), as a command that, upon an accused's request for counsel, "all interrogation cease." Edwards, 451 U.S. at 485 (quoting Fare v. Michael C., 442 U.S. 707, 719 (1979) (emphasis added)).

Edwards was decided before Butler's trial. And even when decided, Edwards did not purport to create new law. Edwards was simply a reconfirmation of the guideline articulated in Miranda that if a person held for interrogation "states that he wants an attorney, the interrogation must cease until an attorney is present." Miranda, 384 U.S. at 474. Nothing in Miranda indicated that application of this rule was to vary with the subject of the interrogation.

In Edwards, the Court reviewed Miranda and subsequent cases recapitulating "Miranda's 'rigid rule that an accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease.'" Edwards, 451 U.S. at 485 (quoting Fare, 442 U.S. at 719 (emphasis added)). Upon so doing, the Court concluded:

> We reconfirm these views and, to lend them substance, emphasize that it is inconsistent with Miranda and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel.

Id. Thus, the Edwards Court did not regard its holding as other than a "reconfirmation" of Miranda.

Roberson did not alter these rules of law. It simply rejected Arizona's attempt to change the rules. In the very opening paragraph of the Court's opinion, Justice Stevens, writing for the majority, described the case as one in which "Arizona asks us to craft an exception [to the Edwards rule] for cases in which the police want to interrogate a suspect about an offense that is unrelated to the subject of their initial interrogation." 486 U.S. at ___. This the Court declined to do.

Instead, it expressed agreement with an earlier Arizona decision holding that Edwards was equally applicable whether the interrogation was about either the offense giving rise to the arrest or an unrelated offense. The opinion then documented how the Court had never departed from its holding in Miranda, as reconfirmed in Edwards, and set forth the reasons why it would not do so in the case before it.

In sum, Roberson says that the law is and has been, since Miranda, that a suspect who has expressed his desire to deal with the police only through counsel is not subject to further interrogation about either the crime he is suspected of having committed or any other crime until counsel has been made available, unless the suspect initiates further communication with the police.* There is thus no retroactivity issue presented in the instant case. Butler merely seeks to invoke the law in effect when he was tried and convicted. I think that he has the right to do so, and that he is entitled to habeas relief.

Judges Phillips, Murnaghan, Sprouse and Ervin authorize me to say that they join in this dissent.

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* My reading is reinforced by what Justice Kennedy, who was joined by the Chief Justice, wrote in dissent in Roberson. He rejected the majority's characterization of the case as one in which the Court was asked to "craft an exception" to Edwards. He asserted instead that Roberson was the first case in which the Court was "asked to apply Edwards to separate and independent investigations." 486 U.S. at ___. While the majority in the instant case obviously prefers this characterization of Roberson, I remind the majority that, as an inferior appellate court, we are bound to follow the Supreme Court majority, whether we agree or disagree.